No. 2614.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL SCHARRENBERG,
Plaintiff and Plaintiff in Error,
vs.
THE DOLLAR STEAMSHIP COMPANY,
et al.,
Defendants and Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR ON ORDER SUSTAINING GENERAL DEMURRER TO HIS COMPLAINT.

H. W. HUTTON,
Attorney for Plaintiff in Error.

Filed this.....day of October, 1915.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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Statement of Facts.

The complaint in this case states a cause of action, the facts pleaded are briefly as follows:

Defendants in error with the exception of James Abernethy, who was master of the British steamer "Bessie Dollar," were the owners and operators of that vessel and the American vessel "Mackinaw," the "Bessie Dollar" being in Shanghai, China, and the defendants other than Abernethy desiring to procure a Chinese crew to come to the United States for the Mackinaw, they caused to be shipped on the Bessie Dollar at Shanghai, an additional crew for

the Bessie Dollar, she having a complete crew on board without them and they made a shipping contract with the additional crew in part as follows: (Trans., page 5)

> "On voyages from Shanghai to San Francisco, there to join the S. S. 'Mackinaw,' or any other vessel, within the limits of 70 degrees north and 70 degrees south latitude, trading to and from as may be required, and back to Shanghai, to be discharged with consent of the local authorities. Term of service not to exceed two (2) years. The master has the option to transfer any or all of the within mentioned persons to any other British or foreign ship bound to Shanghai in the same capacity and at the same rate of wages."

The plain scope of the contract is for the aliens to leave a foreign country and come to San Francisco and work in that port, which is a part of the United States, and on an American vessel the "Mackinaw," whose decks were always a part of the United States, no matter where she might be, and in the event that the "Mackinaw" did not go to Shanghai, the contract shows that the intention was to put them on a ship that did. The men were hired for a period not to exceed two years. In the meantime they could be held on the "Mackinaw" if they joined her and trade back and forth within the limits of 70 degrees north and 70 degrees south latitude until the two years expired.

The fact is the men complained of were brought to San Francisco, on the Bessie Dollar, paid off and discharged and then shipped on the "Mackinaw" under a contract describing their service as follows:

> "From San Francisco, Cal., to Shanghai, China, and such other Asiatic ports as the master may direct, via Grays Harbor, Seattle, Wash., and such other ports on the Pacific Coast as the master may direct; final port of discharge shall be Shanghai, China."

Under the contract the men could be held for at least two years in coastwise trade.

The complaint alleges an intention to bring contract laborers to the United States, there to perform labor—and alleges that the men complained of did perform labor on the "Mackinaw" in San Francisco, and on a voyage thence to Grays Harbor and at Grays Harbor, and that the men complained of were still performing service on the vessel.

It is also alleged that the said men were aliens, natives of China, and that it was the desire of the defendants in error other than James Abernethy, to procure a Chinese person, alien and contract laborer to bring to the United States to perform labor for them therein, that caused them to secure and contract with the men complained of.

It is alleged that at the time in question the men were not needed to work the "Bessie Dollar" and

that labor of a like kind could have been procured in the United States for the "Mackinaw."

The original complaint was filed by Scharrenberg to recover nineteen penalties of one thousand ($1000) dollars each, was amended to bring in new defendants, a general demurrer was sustained to the complaint as amended, no opinion being rendered by his Honor Judge Dooling on the order sustaining the demurrer, a second amended complaint was then filed, the complaint being amended only in the particulars of alleging that other labor of like kind could have been obtained in the United States at the times when, and at the places where the "Mackinaw" was.

A general demurrer was sustained to that complaint, no opinion was filed and no leave to amend given, and plaintiff sued out a writ of error.

ARGUMENT.

I.

The Complaint States a Cause of Action for Penalties Under the Contract Labor Law.

What is known as the Contract Labor law was first passed by Congress in 1885. 23 Stat. at Large, 332. The purpose of the law as has been stated by several courts, was to prevent those working in the United States from being *brought in competition,* with the pauper labor of other countries. *It is clear, however, that those following the sea as a call-*

ing in the United States, were brought in competition in this instance. The law seems to have fared very poorly, however, in the *nisi prius* courts, and we find many reversals for an attempt to abridge its terms. In the case of *United States* vs. *Parsons,* 66 C. C. A. 129, the lower Court held the law did not apply to farmers.

The learned Court of Appeals, Judges Lurton, Severens and Richards presiding, say on page 132:

> "The statute under consideration was adopted for a wise purpose, and ought not to be whittled away, by a process of judicial construction. It contains specified exceptions and they ought not to be extended without good reasons."

When the law was first passed, it seems to have been passed upon the theory that the laborer would come to this country, and no right of exclusion was contained within it. It was amended several times, and finally became a part of the Act known as:

"An Act to regulate the immigration of aliens into the United States." The Act was last amended March 4th, 1913, but in so far as this case is concerned is found in 36 Stat. 263.

And the parts of the Act applicable to this case are as follows:

Sec. 2—

> "That the following classes of aliens shall be excluded from admission into the United States.

> All * * * * * * * persons hereinafter called contract laborers who have been induced or solicited to migrate to this country by offers of employment or in consequence of agreements, oral, written or printed, expressed or implied, to perform labor in this country of any kind, skilled or unskilled, * * * * * * * * * That skilled labor may be imported if labor of like kind unemployed can not be found in this country: *and provided further,* that the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or person employed strictly as personal or domestic servants."

It will be seen that those working on vessels are not within the excepted classes.

Sec. 4 of the Act reads:

> "That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act."

Sec. 5 reads:

> "That for every violation of any of the provisions of section four of this Act the person, partnership, company, or corporation violating

the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

Sec. 7 reads:

"That no transportation company or owner or owners of vessels, or others engaged in transporting aliens into the United States, shall directly or indirectly, either by writing, printing, or oral representation, solicit, invite, or encourage the immigration of any aliens into the United States, but this shall not be held to prevent transportation companies from issuing letters, circulars, or advertisements, stating the sailings of their vessels and terms and facilities of transportation therein; and for a violation of this provision, any such transportation company, and any such owner or owners of vessels, and all others engaged in transporting aliens into the United States, and the agents by the employed, shall be severally subjected to the penalties imposed by section five of this Act."

It will thus be seen, that, *the prepayment of the transportation, the assisting,* or, *the encouraging of the migration or importation,* by any person whatever, or the soliciting, inviting or encouraging by a transportation company brings the several persons or companies within the provisions of the Act.

It is very clear that the defendants in this case first made a contract with the persons in question, and then both assisted and encouraged their migration to, and in fact brought them to this country on their vessel, the Bessie Dollar.

Sec. 33 of the Act reads:

> "That for the purpose of this Act the term 'United States' as used in the title as well as in the various sections of this Act shall be construed to mean the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone, *Provided,* That if any alien shall leave the canal zone and attempt to enter any other place under the jurisdiction of the United States, nothing contained in this Act shall be construed as permitting him to enter under any other conditions than those applicable to all aliens."

The word "migrate" used in the Act applies to a temporary as much as to a permanent residence. It means the passing from one country to the

other, in Sec. 7 the word "immigration" is used showing that Congress intended that section to apply to cases of persons coming to this country at the request or upon the solicitation of a transportation company with the intention of staying.

In the case of *Grant Bros.* vs. *The United States,* 232 U. S. 647, a railroad was being constructed in Arizona, and the contractors sent person over the border to Mexico and hired labor to assist in building the road, suit was brought, judgment recovered and the United States Supreme Court sustained the judgment.

There is no question each of the men so hired would have gone back to Mexico; some did go back, but the judgment was sustained.

See also *U. S.* vs. *Regan,* 232 U. S. 37, reversing 203 Fed. Rep. 454.

In the case of *Taylor* vs. *U. S.,* 152 Fed 1, it was held that the Act in question applied to seamen. That case was subsequently reversed by the U. S. Supreme Court in 207, U. S. 125, but only on the point that the judgment set too high a standard of conduct for a master of a vessel in endeavoring to prevent a seaman from deserting. Sec. 18 of the Act was under consideration in that case, the section has since been amended to meet the objections stated in the above mentioned decision.

The United States Supreme Court, however, uses the following language on Page 126:

> "A reason for the construction adopted below was found in the omission of the word 'immigrant' which had followed 'alien' in the earlier acts. No doubt that may have been intended to widen the reach of the statute, but we see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the act who did not come here with intent to remain."

So temporary residents are now included in the law.

In *U. S.* vs. *Craig*, 28 Fed. Rep. 795, Judge Brown held that the Act applied to a ship carpenter.

II.

The Men in Question Were in the United States When on Board of the "Mackinaw."

Wilson vs. *McNamee*, 102 U. S. 572, 574.

> "A vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality; all on board are endowed and subject accordingly."
>
> *Crapo* vs. *Kelly*, 16 Wallace, 625.

In the case of the Chinese Waiter, 13 Fed. Rep., 286, his honor, Judge Field, held, that a Chinese person who was on an American vessel when the ex-

clusion act went into effect, was in the United States, and entitled to land upon her return, upon the theory that he had never left the United States.

In re Ah Tie, 13 Fed. Rep., 291.

In the case of In re Ross, 140 U. S. 453, the United States Supreme Court says, on page 472:

> "The national character of the petitioner for all the purposes of the consular jurisdiction was determined by his enlistment as one of the crew of the Bullion. By such enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefits of all the laws passed by congress on behalf of American seamen and subject to all their obligations and liabilities."

Page 479:

> "This rule that the vessel being American is evidence that the seamen on board are such, is now an established doctrine of this country, and in support of it there is with the American people no diversity of action."

In the case of the *United States* vs. *Dwight Manufacturing Co.,* 210 Fed. 79-81 & 85, a demurrer to a much weaker complaint than the complaint in this case was overruled.

We have not the ideas of the lower court in sustaining the demurrer, but are confident the complaint states a cause of action.

The action is brought to recover penalties, and for no other purpose. But to show that actions like the defendants herein were guilty of, led to other and very serious consequences and for that reason the exceptions contained in the law cannot be extended in this case we now present the following:

III.

The Contract Laborers in This Case Were Chinese, Not Entitled to Enter the United States. Still Did Enter It.

Each of them shipped for service on the "Mackinaw," before the United States Shipping Commissioner; being so shipped they each became American Seamen, and as is stated in In re Ross, 140 U. S. 453, above cited:

> "and as such entitled to the benefit of all the laws passed by congress on behalf of American seamen."

They were thus entitled to the following privileges and benefits:

Under Section 4507, Revised Statutes, each was entitled to go to the United States Shipping Commissioner's Office to receive his pay in the event that he was transferred to another vessel.

Under Section 4526, Rev. Stat., each would be entitled to be returned to the United States at its expense in the event of the wreck of the "Mackinaw."

Under Section 4527 each would be entitled to libel the vessel and of course be present at the trial, if he was discharged before one month's pay was earned.

Under Section 4546 he would be entitled to go before a judge if his wages were not paid.

Under Section 4554 he would be entitled to go before a Shipping Commissioner, demand and have any question relating to him arbitrated.

Under Section 4561 he would be entitled to be discharged in the United States if the vessel was unseaworthy.

Under Section 4567 he would have the right to go ashore and make a complaint.

Under Section 4576 he would be entitled to be returned to the United States upon some discharges.

Under Section 4577 it would be the duty of the Consul to send him back to the United States at the expense of the United States if he became destitute in a foreign country.

Under 4581, he would have the right to be returned to the United States in any event.

In case of a sale of the vessel in a foreign country he would have the right to be returned under Section 4582.

In the event of sickness he would have the right to go to the United States Marine Hospital for treatment.

Many other sections could be cited tending to show that the men in question in this case acquired rights that virtually nullified the Exclusion Act.

See also Sections 4578, 4579, 4580, 4583.

It would be very easy for masters of foreign and other vessels to flood the country with Chinese seamen in violation of the exclusion act, if they are permitted to do as has been done in this case.

There is no question the men complained of were in the United States when on board of the "Mackinaw" at all times, and were particularly so when on board of her while she was lying at San Francisco, and Grays Harbor, and that they were contract laborers does not admit of any dispute, as aliens who are contracted with in a foreign port to come to the United States and join an American vessel in an American port, are certainly contract laborers.

Section 22 of the Act gives the Commissioner General of Immigration power to establish rules and regulations, etc., "not inconsistent with law." Such rules have been established, not only relating to seamen, but as to all other aliens. We have no doubt the rules will be cited by defendants in error, but they only apply to cases where a seaman happens

to be on board of a vessel, and his contract for some reason that could not be foreseen has ended, they cannot set aside the law, nor be applicable to case where there was a deliberate intent as in this case to violate the law.

We respectfully submit that the order sustaining the demurrer to plaintiff's complaint should be reversed.

Respectfully,

H. W. HUTTON,
Attorney for Plaintiff in Error.